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IN THE

Supreme Court of the United States

NATIONAL CASUALTY COMPANY,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONER

The Maritime Law Association of the United States (hereinafter, "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of National Casualty Company ("National Casualty") for a writ of certiorari.[1]

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nationwide bar association founded in 1899, with a membership of approximately 3,100 attorneys, judges, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests—shipowners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.[2] This Court has described the MLA as "an organization of experts

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Pursuant to this Court's Rule 37.2(a), *amicus curiae* states that petitioner and respondent received timely notice of the intent to file this brief and have each given written consent to the filing of this brief. Such written consent has been filed with the Clerk.

The MLA takes no position on the correctness or incorrectness of the opinion of which Petitioner seeks review. The MLA submits this brief merely to delineate the issues that it believes require this Court's decision and to argue in favor of review.

[2] The MLA has sponsored a wide range of maritime legislation and revisions thereto in its 108 years of existence, including the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315; the maritime portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603-1611; the Maritime Lien Acts of 1910 and 1920 and their 1988 amendments, *see* 46 U.S.C. §§ 31341-31343; the Act permitting appeals from interlocutory admiralty decrees, 28 U.S.C. § 1292(a)(3); the Public Vessels Act, 46 App. U.S.C. §§ 781-790; the Extension of Admiralty Jurisdiction Act, 46 App. U.S.C. § 740; and the Inland Rules Act, 33 U.S.C. §§ 2001-2038. See also, *Merchants Bank of Mobile v. Dredge* GENERAL G.L. GILLESPIE, 663 F.2d 1338, 1350, fn. 17 (5th Cir. 1991) ("*Merchants Bank*") [MLA "regularly participates in national and international proceedings concerning maritime treaties and conventions"].

in admiralty law" and "an expert body of maritime lawyers . . ."[3]

The purposes of the MLA[4] are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the *Comitè Maritime Internationale* and as an affiliated organization of the American Bar Association, and to act with other associations to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

It is the MLA's policy to involve itself as *amicus curiae* only when important issues of maritime law or practice are implicated and only when the effect of the Court's decision on maritime commerce or admiralty law may be substantial.[5] The MLA is interested

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[3] *Offshore Logistics v. Tallentire*, 477 U.S. 207, 223-24 (1986) ("*Offshore Logistics*").

[4] Admiralty courts have recognized the MLA's general interests and concerns, including the "growing risk that fundamental principles of maritime law are presently being inadvertently eroded." *Merchants Bank*, 663 F.2d at 1349, fn. 17.

[5] *E.g.*, *Exxon Shipping Co. v. Baker*, No. 07-219 (*cert granted* Oct. 29, 2007); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 487 U.S. 358 (1990); *Offshore Logistics*, 477 U.S. 207; and *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

in this case because the issue substantially affects admiralty practice and procedure, and the result of the case will impact a sizeable portion of its nationwide membership.

First, denying the petition for certiorari would adversely affect uniformity of maritime law and practice. There exists a split of opinion among the circuits as to whether a compulsory counterclaimant can demand a jury trial in pursuing a legal counterclaim when a plaintiff has elected to proceed in admiralty, without a jury, pursuant to Rule[6] 9(h).[7] This Court's ruling is necessary to make the law uniform.

Second, denying certiorari may affect traditional admiralty jurisdiction. Controversies arising from marine insurance contracts, such as the one at bar, are at the core of district courts' admiralty jurisdiction.[8] While admiralty jurisdiction does not preclude other bases of jurisdiction in *in personam* actions,[9] when more than one basis exists, a suitor has long had the election to determine whether to proceed under admiralty jurisdiction, and thereby avail itself

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[6] All citations to herein to a "Rule" refer to the Federal Rules of Civil Procedure.

[7] *E.g.*, *Concordia Company, Inc. v. Panek*, 115 F.3d 67, 71 (1st Cir. 1997) ("*Concordia*") [recognizing "split of authority on this issue" of whether a plaintiff's election to proceed in admiralty under Rule 9(h) "characterizes the whole action regardless of any Seventh Amendment right the counterclaimant may have to a jury trial"].

[8] 28 U.S.C. § 1333; *Insurance Co. v. Dunham*, 78 U.S. (11 Wall) 1, 31-2 (1870).

[9] 28 U.S.C. § 1333(1); *Pryor v. American President Lines*, 520 F.2d 974, 976-77 (4th Cir. 1975).

of the special benefits of admiralty procedures and remedies.[10]

Third, the outcome of this case would affect the meaning of law originally advanced by the MLA. The MLA played a leading role in the 1966 merger of civil and admiralty rules of procedure.[11] The MLA's Committee on Practice and Procedure worked closely with the Advisory Committee, which included several senior members of the MLA. As a result, the MLA played a significant role in preserving essential features of traditional admiralty practice in the unified rules.

For the foregoing reasons, the MLA's nationwide membership of attorneys, judges, law professors, and members of the maritime community have a special interest in this Court issuing a writ of certiorari to the Fourth Circuit Court of Appeals.

SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

There are compelling reasons to grant National Casualty's petition for a writ of certiorari.[12] First, the issue on which National Casualty seeks review is important[13] because it implicates constitutional concerns, construction of federal statutes and rules of procedure, and questions of federal jurisdiction.

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[10] *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252 (5th Cir. 1975).

[11] THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, HISTORY, PURPOSES, ORGANIZATION & ACTIVITIES, §II, p. 5 (2006).

[12] SUP. CT. RULE, 10.

[13] SUP. CT. RULE, 10(a) and (c).

Second, the issue has not been settled by this Court.[14] Though the Fourth Circuit analogized this case to two prior Supreme Court opinions,[15] neither of those cases presented facts similar to the facts of this case.

Third, the issue should be settled by this Court.[16] Not only is this question constitutionally important, but it is particularly suitable for this Court to resolve it. Admiralty is uniquely federal[17] and national.[18] Therefore, procedural and substantive uniformity are essential. Compounding the matter, admiralty is predominantly judge-made law.[19] Therefore, this Court has a special authority and responsibility to address disputes in admiralty.[20]

Fourth, the Fourth Circuit's decision below is in conflict with decisions of other United States courts of appeals on the same important question.[21] The Fourth Circuit's opinion expressly recognizes an existing split of authority among the circuits: "In cases involving counterclaims or cross-claims that could proceed at law, *courts are divided* on the

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[14] SUP. CT. RULE, 10(c).

[15] *In re Lockheed Martin Corp.*, 503 F.3d 351, 356-57 & 359 (4th Cir. 2007), citing *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962) ("*Ellerman*") and *Beacon Theatres Inc. v. Westover*, 359 U.S. 500 (1959) ("*Beacon Theatres*").

[16] SUP. CT. RULE, 10(c) .

[17] U.S. CONST. art. III, § 2.

[18] *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

[19] *Id.* at 576.

[20] *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-1 & fn. 12 (1963) ("*Fitzgerald*").

[21] SUP. CT. RULE, 10(c).

question of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial."[22] Other federal courts, both circuit and district, also recognize the split.[23]

ARGUMENT OF *AMICUS CURIAE*

I. PETITIONER NATIONAL CASUALTY PRESENTS AN IMPORTANT QUESTION

National Casualty presents a constitutionally important issue for this Court's decision:[24] whether a counterclaimant, by filing its counterclaim as a legal claim, can negate a declaratory relief plaintiff's election to proceed without a jury in admiralty. This implicates multiple constitutional and statutory provisions.

Article III, Section 2 of the United States Constitution vests the district court with jurisdiction over controversies both in admiralty and between diverse citizens. "[T]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction [and] to Controversies . . . between Citizens of different States . . ."[25] The Seventh Amendment preserves "the right of trial by jury" in "Suits at common law."[26] Historically, suits in admiralty were not "Suits at common law,"[27] but the line between law and admiralty is not always bright.

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[22] *In re Lockheed Martin Corp.*, 503 F.3d at 357 (italics added).

[23] *E.g.*, *Concordia*, 115 F.3d at 71.

[24] SUP. CT. RULE, 10(a) and (c).

[25] U.S. CONST. art. III, § 2, cl. 1.

[26] U.S. CONST. amend. VII.

[27] *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847).

"Many claims," including this one, "are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction."[28] On the one hand, pursuant to Article III, Section 2's authorization, Congress legislated that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – (1) citizens of different states . . ."[29] In such diversity cases proceeding at law, the Seventh Amendment preserves the right to a jury trial.[30] On the other hand, Congress (indeed, the First Congress in 1789[31]) has also authorized the district courts to exercise "exclusive" jurisdiction in "[a]ny civil case of admiralty or maritime jurisdiction"[32] where again, absent contrary Congressional directive, there is no right to a jury. However, that same authorization of jurisdiction "sav[es] to suitors in all cases all other

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[28] Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. 69, 75.

[29] 28 U.S.C. § 1332(a).

[30] "The authority and only authority" for the common law of a state "is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 79 (1938); citing *Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting). However, "the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions." *Simler v. Conner*, 372 U.S. 221, 222 (1963).

[31] See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 328-29 & fn. 9 (1955).

[32] 28 U.S.C. § 1333.

remedies to which they are otherwise entitled."[33] Thus, while the district court's admiralty jurisdiction is "exclusive,"[34] the statute[35] concurrently preserves common law "remedies" to suitors where the common law is competent to give them, such as cases where jurisdiction could be based on diversity in addition to admiralty.[36] In such cases, "remedies" include "all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved," including "[t]rial by jury."[37]

Procedurally, if legal and admiralty bases for jurisdiction both exist, the "saving to suitors" clause allows the plaintiff to determine whether to proceed in district court in admiralty, at law in state court, or at law in district court.[38] If the plaintiff chooses admiralty, the action is thereafter within the court's "exclusive" admiralty jurisdiction, notwithstanding the defendant's preference or the fact that, but for the election, the courts of law may also have had jurisdiction and a jury right would have attached through

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[33] 28 U.S.C. § 1333(1) (italics added).

[34] 28 U.S.C. § 1333; *The Hine*, 71 U.S. 555, 568-69 (1866).

[35] "Concurrent jurisdiction is statutory, not constitutional, based upon the saving to suitors clause in the statute." Thomas J. Schoenbaum, Admiralty and Maritime Law (Thompson-West, 2001), § 4-4, p. 173, fn. 4, col. 2.

[36] *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123-24 (1924) ("*Red Cross Lines*") ["[b]y reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with admiralty cases" though not in *in rem* actions].

[37] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454-55 (2001); quoting *Red Cross Line*, 264 U.S. at 124.

[38] *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-372 (1959).

the Seventh Amendment.[39] Before the 1966 unification of the rules of civil and admiralty procedure, the suitor made its election by filing on the law or admiralty "side" of the district court.[40] That distinction did not survive the merger, which gave birth to Rule 9(h), and from which a single form of action arose.[41] But because the legal and admiralty jurisdiction of the court can be concurrent, pursuant to its delegated authority (which has the force of statute[42]) and consistent with the saving to suitors clause,[43] the Supreme Court provided a bright line rule by allowing "the pleader" to designate a choice of jurisdiction in its pleading.[44] When the Fourth Circuit issued

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[39] *In re Lockheed Martin Corp.*, 503 F.3d at 357; quoting *Waring*, 46 U.S. at 460-61.

[40] Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. at 75.

[41] 28 U.S.C. § 1331(1); Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. at 75.

[42] The Federal Rules of Civil Procedure have the same authority and effect as congressionally enacted statutes. 28 U.S.C. §§ 2071 and 2072; *Republic Tobacco Co. v. N. Atlantic Trading Co., Inc.*, 481 F.3d 442, 448 (7th Cir. 2007) ["[w]here the Federal Rules conflict with a 'procedure provided in an earlier act of Congress,' the Federal Rules control"]; *Nordmeyer v. Sanzone*, 315 F.2d 780, 781-82 (6th Cir. 1963) ["[i]t is well settled that the Federal Rules of Civil Procedure have the force and effect of a federal statute"]; *Griffith Co. v. NLRB*, 545 F.2d 1194, 1197, fn. 3 (9th Cir. 1976) ["statutes are superseded by conflicting federal rules"].

[43] 28 U.S.C. § 1333(1).

[44] Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. at 75-76.

its writ of mandamus in this action, Rule 9(h) then provided, in pertinent part:[45]

> **Admiralty and Maritime Claims**. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Rule 38(e), in turn, at that time stated that "[t]hese rules shall not be construed to create a right to trial by jury on the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." It now states that "[t]hese rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)," i.e., when the suitor has elected to proceed in admiralty.

In issuing mandamus, the Fourth Circuit[46] emphasized the effects of the 1948 Declaratory Judgment

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[45] Effective December 1, 2007 (after the Fourth Circuit issued its writ of mandate in the present case), Rule 9(h) was amended, though "[t]hese changes are intended to be stylistic only." It now reads, in pertinent part: "**Admiralty and Maritime Claims**. (1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions."

[46] *In re Lockheed Martin Corp.*, 503 F.3d at 359.

Act.[47] The Declaratory Judgment Act provides, in pertinent part, that:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

Further to that scheme, Rule 57 then provided,[48] in pertinent part, "[t]he procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39."

II. THE MATTER HAS NOT BEEN SETTLED BY THIS COURT

Despite the existence of an actual controversy and although the Declaratory Judgment Act gives the district court discretion to decline to hear a controversy on which the suitor seeks no relief but a declaration,[49] the Fourth Circuit held that allowing the declaratory relief plaintiff's election to determine the jurisdiction of the court, pursuant to Rule 9(h),

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[47] 28 U.S.C. § 2201.

[48] Effective December 1, 2007, Rule 57 now provides, in pertinent part: "These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial..."

[49] District courts have discretion to refuse adjudication of declaratory relief actions (*A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 342 (1961)) regardless of the basis or existence of subject-matter jurisdiction. *United States v. City of Las Cruces*, 289 F.3d 1170, 1180-81 (10th Cir. 2002).

and therefore the availability of a jury trial pursuant to Rule 38(e), amounted to a "race to the courthouse door." This result, according to the Fourth Circuit, is undesirable because the declaratory relief defendant would have no choice but to pursue its compulsory counterclaims without a jury[50] when it otherwise would have had the suitor's election.[51]

The Fourth Circuit[52] appears to have found to be dispositive the Supreme Court's decisions in *Ellerman*[53] and *Beacon Theatres*.[54] But neither of those cases involved the facts presented here. In *Ellerman*, a longshoreman employed by a stevedore was injured while unloading a ship, and sued the ship's owners.[55] Like this case, both admiralty[56] and diversity jurisdiction existed.[57] Unlike this case, the suitor brought the action on the law side of the court, not the admiralty side, and demanded a jury trial.[58]

At trial, the jury found that the shipowners were liable and that the stevedore was not at fault. The court of appeals affirmed the jury's verdict against the owners but reversed the judgment in favor of the stevedore, finding that it was negligent as a matter of law. The Supreme Court held that the court of appeals violated the Seventh Amendment's proscrip-

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[50] Rule 13(a).

[51] *In re Lockheed Martin Corp.*, 503 F.3d at 359.

[52] *Ibid.*

[53] *Ellerman*, 369 U.S. 355.

[54] *Beacon Theatres*, 359 U.S. 500.

[55] *Ellerman*, 369 U.S. at 356-57.

[56] U.S. CONST. art. III, § 2; 28 U.S.C. § 1333(1).

[57] U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a).

[58] *Ellerman*, 369 U.S. at 357.

tion against re-examining factual findings by a jury in cases at common law.[59]

"In [the Fourth Circuit's] view, *Ellerman* makes it clear that the Seventh Amendment applies to admiralty claims that are tried 'at law' by way of the saving-to-suitors clause." But the Fourth Circuit also correctly recognized "an important difference . . . between *Ellerman* and the case at bar. Whereas in *Ellerman* the plaintiff elected to proceed at law, the plaintiff here elected to proceed in admiralty."[60] Ultimately, however, the Fourth Circuit "believe[d] . . . that this factual difference is [ir]relevant."

Lockheed Martin argued, and the Fourth Circuit agreed, that Lockheed Martin was the true "suitor," not National Casualty, since National Casualty merely sought declaratory relief.[61] Lockheed Martin and the Fourth Circuit trivialize, as a "race to the courthouse door," National Casualty's election to avail itself of the Declaratory Judgment Act,[62] although declaratory judgment actions often resolve all issues in marine insurance disputes.[63]

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[59] *Id.* at 358.

[60] *In re Lockheed Martin Corp.*, 503 F.3d at 358-59

[61] *Ibid.*

[62] 28 U.S.C. § 2201; Rule 57.

[63] See, e.g., *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.*, – F.3d – (9th Cir. 2008), 2008 WL 351688, at *2 [summary judgment for plaintiff insurers in declaratory relief action affirmed and insurers entitled to void insurance policy for insured vessel owner's failure to disclose material information]; *Cigna Property and Casualty Ins. Co. v. Polaris Pictures Corp.*, 149 F.3d 412, 419 (9th Cir. 1998) ("*Cigna Property*") [defendant insureds not entitled to jury trial on counterclaims at law in marine insurance case; plaintiff insurer's equitable rescission claims, tried to the court, resolved all issues].

The Fourth Circuit below said that this Court's ruling in *Beacon Theatres* commanded a jury trial. There, the plaintiff sought a declaration that it was not violating the Sherman Antitrust and Clayton Acts, characterizing its claims as equitable. The defendant counterclaimed and demanded a jury trial. The Fourth Circuit quoted part of the *Beacon Theatres* opinion:[64]

> [W]hile allowing prospective defendants to sue to establish their nonliability, [the Declaratory Judgment Act] specifically preserves the right to jury trial for both parties. It follows that if Beacon would have been entitled to a jury trial in a . . . suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first. Since the right to trial by jury applies to . . . suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions.

An obvious distinction between this case and *Beacon Theatres* is that the latter was not an admiralty case and involved no Rule 9(h) election. The Fourth Circuit concluded that "[t]here is nothing in *Beacon Theatres* that suggests that this inquiry does not apply when the declaratory judgment action is brought in an admiralty case."[65] The contrary position is "the right to trial by jury," unlike in antitrust cases, is not

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[64] *In re Lockheed Martin Corp.*, 503 F.3d at 358-59; quoting *Beacon Theatres*, 359 U.S. at 504.

[65] *In re Lockheed Martin Corp.*, 503 F.3d at 359.

"an essential part of the congressional [or constitutional] plan" for admiralty litigation.[66]

Further, the result in *Beacon Theatres* appears to have turned on a statutory rather than a constitutional analysis.[67] The *Beacon Theatres* Court was "of the opinion that, under the Declaratory Judgment Act and the Federal Rules of Civil Procedure, neither [of the plaintiff's] claim[s] can justify denying [defendant] a trial by jury of all the issues in the antitrust controversy."[68] "[T]he Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 . . . and Fed. Rules Civ. Pro. 57 . . . while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties."[69]

The MLA suggests, without taking a substantive position, that there is a contrary view, and this Court should decide the issue. Rule 57 states that a jury is available in declaratory relief actions in the manner

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[66] *Waring*, 46 U.S. at 460.

[67] Only after determining that the Declaratory Judgment Act and Rules of Civil Procedure protected defendant's right to a jury trial in antitrust cases brought in equity (not admiralty) did the Court address the Seventh Amendment protection of jury trials. *Beacon Theatres*, 359 U.S. at 509-11. It is a fundamental doctrine of jurisprudence that constitutional grounds should not be reached when a narrower, statutory ground will resolve a case. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 457 & fn. 1 (1985) (Marshall, J., dissenting). Thus, the constitutional dimension of *Beacon Theatres* appears to be dicta, and is therefore not compelling authority. *Tyler v. Cain*, 533 U.S. 656, 663, fn. 4 (2001) [dicta, language unnecessary to reach the court's result, is not binding]; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[68] *Beacon Theatres*, 359 U.S. at 506.

[69] *Id.* at 504.

provided by Rule 38. Rule 38(e), in turn, states that the rules do not create a "right to a trial by jury of the issues in an admiralty claim within the meaning of Rule 9(h)." Rule 9(h) leaves it to the "pleader." This Court was aware of the Declaratory Judgment Act, including Rule 57, when it enacted Rule 9(h).[70] Thus, the fact that *Beacon Theatres* was not maritime distinguishes it from the facts underlying this case, which was brought in admiralty. Thus, the question presented here is an open one.[71]

III. THE MATTER SHOULD BE SETTLED BY THIS COURT

This is a fundamentally important matter due to its constitutional, jurisdictional, statutory, and procedural implications. For that same reason, it should be settled by this Court.[72] But even apart from its fundamental importance, there are other reasons to grant certiorari.

This Court has a unique authority and responsibility to resolve admiralty disputes.[73] The Constitution singles out admiralty as a matter of national importance[74] that is uniquely within the federal government's judicial purview.[75] But with only limited

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[70] The Declaratory Judgment Act, including Rule 57, predates unification, which occurred in 1966.

[71] Cf. *In re Lockheed Martin Corp.*, 503 F.3d at 359.

[72] SUP. CT. RULE, 10(c).

[73] *Fitzgerald.*, 374 U.S. at 20-1 & fn. 12.

[74] U.S. CONST, art. III, § 2; *The Lottawanna*, 88 U.S. at 575.

[75] U.S. CONST. art. III, § 2. While state courts may have concurrent legal jurisdiction over some cases where admiralty jurisdiction exists, 28 U.S.C. § 1333(1), they still must apply

exceptions, Congress has left it to the courts to define the law and practice of admiralty.[76] Therefore, admiralty tribunals below as well as the nationwide admiralty bar seek this Court's guidance, especially on such fundamental matters as the scope of concurrent jurisdiction and the availability *vel non* of a jury trial, to resolve divergences among the lower courts.

Admiralty abhors non-uniformity. It is particularly important for this Court to resolve a circuit split, since it creates an undesirable uncertainty for maritime actors and the proctors who advise them. Further, the circuit split encourages forum shopping among the circuits.[77]

IV. THERE IS A CLEAR CONFLICT OF OPINION AMONG THE CIRCUIT COURTS OF APPEALS AND AMONG THE DISTRICT COURTS

The Fourth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]"[78] The Fourth Circuit itself recognized the split: "In cases involving counterclaims or cross-claims that could proceed at law, *courts are divided* on the ques-

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federal maritime law pursuant to the "reverse-*Erie* doctrine." *Offshore Logistics*, 477 U.S. at 222-23.

[76] *The Lottawanna*, 88 U.S. at 576; *Fitzgerald.*, 374 U.S. at 20-21 & fn. 12.

[77] *Silver Star Enterprises, Inc. v. SARAMACCA MV*, 82 F.3d 666, 669-70 (5th Cir. 1996) ["A decision by this circuit creating a circuit split and permitting the affixation of maritime liens for bulk container lessors would spawn uncertainty, compounded by forum-shopping and extravagant lien claims"].

[78] SUP. CT. RULES, rule 10(a).

tion of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial."[79] As it now stands, in maritime controversies arising from the Fourth, Eighth, and Ninth circuits, legal counterclaimants can avail themselves of a jury trial despite a plaintiff's Rule 9(h) admiralty designation. In the Fifth Circuit, the counterclaimant's legal claim does not vitiate the plaintiff's election to proceed in admiralty. Another circuit, the First, has recognized the conflict, but navigated its way around it.[80] Many district courts have taken sides, too.

After acknowledging the circuit split, the Fourth Circuit sided with the Eighth and Ninth circuits in their respective opinions[81] *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*[82] ("*Koch Fuels*") and *Wilmington Trust v. District Court for the District of Hawaii*[83] ("*Wilmington Trust*"). In *Koch Fuels*, plaintiff filed an *in rem* action for possession of a cargo of fuel and elected admiralty jurisdiction pursuant to Rule 9(h).[84] An intervenor filed a legal cross-

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[79] *In re Lockheed Martin Corp.*, 503 F.3d at 357 (italics added).

[80] *Concordia*, 115 F.3d at 71 ["declin[ing] to resolve the difficult issue" because counterclaimant failed to properly invoke option to proceed in law, rather than admiralty].

[81] *In re Lockheed Martin Corp.*, 503 F.3d at 357-58.

[82] 704 F.2d 1038 (8th Cir. 1983).

[83] 934 F.2d 1026 (9th Cir. 1991); *c.f. Cigna Property*, 159 F.3d at 415 & 418-19; *cert denied*, 528 U.S. 815 [plaintiff insurer's admiralty claim for rescission of marine insurance contract allowed to proceed as bench trial, despite defendant/counterclaimant insured's request for jury trial on legal counterclaims for breach of contract and bad faith]; and *McCrary v. Seatrain Lines, Inc.*, 469 F.2d 666, 668 (9th Cir. 1972).

[84] *Koch Fuels*, 704 F.2d at 1039.

claim against plaintiff for breach of a charterparty agreement and successfully moved to sever its legal cross-claim from the admiralty action. The legal action was tried to a jury first. The court then tried the admiralty action. On plaintiff's appeal, the Eighth Circuit found no abuse of discretion in severing the trials and allowing the intervenor to try its claims to a jury.

In *Wilmington Trust*, a preferred ship mortgagor brought an *in rem* admiralty action against a ship.[85] A secondary mortgagor intervened, filing its own *in rem* action against the ship and legal and equitable counterclaims against the plaintiff.[86] The Ninth Circuit held that the intervening counterclaimant could, by filing an *in personam* legal counterclaim, vitiate the plaintiff's election to proceed in admiralty without a jury in its *in rem* claim.[87]

Some districts courts are aligned with the view of the Fourth, Eighth, and Ninth circuits. *See e.g.*, *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258, 261 (S.D.N.Y. 1999); *Reliance Nat'l Ins. Co. (Eurpose Ltd. v. Hanover*, 222 F.Supp.2d 110, 115-16 (D. Mass. 2002); *Progressive Northern Ins. Co. v. Bachman*, 314 F.Supp.2d 820, 833 (W.D. Wis. 2004); and *Canal Barge Co. v. Commonwealth Edison Co.*, 2002 WL 206054 at 3-4 (N.D. Ill. 2002).

The Fifth Circuit is probably the largest of the circuits in terms of admiralty and maritime litigation. It,[88] contrary to the Fourth, Eighth, and Ninth

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[85] *Wilmington Trust*, 934 F.2d at 1027.

[86] *Id.* at 1027-28.

[87] *Id.* at 1031-32.

[88] See, *infra*, footnotes 90 and 91.

circuits, has "held that the plaintiff's Rule 9(h) election to proceed under admiralty law governs the entire proceeding and precludes the defendant's right to a jury trial which may otherwise exist."[89] In *Harrison v. Flota Mercante Grancolombiana, S.A.*, the Fifth Circuit held that a third-party defendant's demand for a jury trial did not "emasculate" the plaintiff's Rule 9(h) election to proceed in admiralty without a jury.[90] Similarly, in *Becker v. Tidewater*,[91] the Fifth Circuit rejected defendant's contention that its demand for a jury trial on the basis of diversity trumped plaintiff's Rule 9(h) admiralty election.

District courts adhering to this view (excluding, for the sake of brevity, those mentioned in National Casualty's Petition for Writ of Certiorari, at pp. 14-15) include: *Norwalk Cove*, 100 F.Supp.2d at 114; *Matter of Armatur*, 710 F.Supp. 404, 405, fn. 4 (D. Puerto Rico 1989); *Underwriters Subscribing to Certif. of Ins. No. 98B1/800 v. On the Loose Travel, Inc.*, 1999 A.M.C. 1742, 1743 (S.D. Fla. 1999); *Hails v. Atlantic Richfield Co.*, 595 F.Supp. 948, 951-52 (W.D. La. 1984); and *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192, 195 (N.D. Cal. 1972).

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[89] *ING Groep, N.V. v. Stegall*, 2004 A.M.C. 2992, 2995 (D. Colo. 2004); see also *Norwalk Cove Marina, Inc. v. S/V ODYSSEUS*, 100 F.Supp.2d 113, 114 (D. Conn. 2000) ("*Norwalk Cove*") ["majority of courts hold that the plaintiff's electing to sue in admiralty has the right to determine the character of the action, which should not be disturbed by the defendant's counterclaims"].

[90] 577 F.2d 968 (5th Cir. 1978).

[91] 405 F.3d 257, 259 (5th Cir. 2005); see also *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1487 (5th Cir. 1992) ["the Supreme Court cases do not require a jury trial as an element of a 'saving to suitors' remedy"].

There is an unresolved conflict among the circuit and district courts, to the detriment of uniformity and the prejudice of members of the maritime industry and admiralty lawyers who advise them.

CONCLUSION

National Casualty presents an important issue, which this Court has not yet decided, but should. The issue has created an undesirable conflict in the federal circuits and district courts that can only reasonably be resolved by this Court. Therefore, the MLA, on behalf of its membership of admiralty lawyers, judges, academics, and industry actors, respectfully urges this Court to grant National Casualty's petition for a writ of certiorari.

Respectfully submitted,

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